SIM KIAN HOON (M.W.)

v.

CHIA KEE TECK

HIGH COURT MALAYA, MALACCA
WAN YAHYA J
[ORIGINATING SUMMONS NO. 110/83]
11 OCTOBER 1984

CIVIL PROCEDURE: *Maintenance proceedings - Legal nature of application for enforcement of maintenance order - Sentencing - Married Women and Children (Maintenance) Ordinance 1950, s. 4.*

On an application to show cause against committal filed by the wife (who had custody of the children) for maintenance of the children, the respondent opposed the application on two grounds. Firstly that if the purpose of the application was to commit the respondent to prison under O. 52, Rules of the High Court 1980, there was no evidence of leave having been obtained by the applicant; secondly, if the application was pursuant to the Debtors Ordinance 1957, then the proper procedures should have been by way of a Judgment Debtors Summons.

Held:

[1] Maintenance proceedings is initially a civil claim until one party moves the Court to act on the other party's non-compliance of the order, wherein the enforcement proceedings become criminal in nature.

[2] An application for enforcement of a Maintenance Order is not in the nature of committal proceedings under O. 52, Rules of the High Court nor the Debtors Ordinance. There is no prescribed form for a notice for such enforcement under the Married Women and Children (Maintenance) Ordinance 1950 but the notice in this case clearly required the respondent to give reasons for non-compliance.

[Application succeeds.]

Cases referred to:

Chew Cheng Swee v. Chan Chye Neo [1932] MLJ 5
Haji Ahmad v. Sadah [1954] 20 MLJ 101
Stewart v. Stewart [1952] 18 MLJ 211
Wong Eng Fook v. Ho Kiat Moi [1948-49] MLJ Supp 177

Legislation referred to:

Debtors Ordinance 1957. ss. 4(6), (7).
Rules of the High Court 1980, O. 52.

For the applicant - D. A. Devadason; M/s. D. A. Devadason
For the respondent - J. Velupillai; M/s. E. Ramasamy & Co.

JUDGMENT

Wan Yahya J:

By a consent judgment dated 12 October 1983, the applicant herein was given custody and the respondent ordered to pay a monthly sum of RM250 for the maintenance of each of the four children aged 17, 16, 14 and 12 until each attained the age of 21. The first payment of RM1,000 was made on 5 November 1982 and payments were made until May 1984. Thereafter no payments have been made.

On 6 August 1984, applicant took out the present notice to show cause but could only serve it on the respondent on 15 September 1984 after numerous attempts.

On the hearing before me Counsel for the respondent opposed the application on two grounds. He said if the purpose of this application was to commit respondent to prison under O. 52 of the Rules of the High Court 1980, then there was no evidence of leave having been obtained by applicant under O. 52 r. 2(i). On the other hand he contends if the application was made under the Debtors Ordinance 1957, then the proper procedure should have been by way of a Judgment Debtors Summons and that a judgment notice could only be issued after the procedures prescribed under s. 4(i) to (vi) have been complied with. Before going into the relevance of O. 52 and the Debtors Ordinance on this application, it is imperative that we look into the nature of the present proceedings before this Court. The order to pay maintenance, although made in the High Court, emanated from the Married Women and Children (Maintenance) Ordinance 1950. Section 3 authorises the Sessions and Magistrate Court to make order for maintenance; s. 4 provides the manner in which the amount due may be levied in case of wilful neglect to comply with such order and s. 9 stipulates that the same jurisdiction applies to the High Court.

The peculiarity of maintenance proceedings has been described by several Judges as criminal in form and civil in substance. See *Chew Cheng Swee v. Chan Chye Neo* [1932] MLJ 5; *Haji Ahmad v. Sadah* [1954] 20 MLJ 101 @ 108. The initial claim for maintenance has always been regarded as a civil claim up to the stage of the extraction of the order but the moment a party moves the Court under s. 4 for non-compliance of the Order, the enforcement proceedings becomes criminal in nature. In *Stewart v. Stewart* [1952] 18 MLJ 211 @ 212 Spenser Wilkinson J expressed the following views:

> Nevertheless, although the 1950 Ordinance does nothing to clear up this question, at least it has made no substantial alteration in the law. I am, therefore, of opinion that the decision in the case of *Chew Cheng Swee v. Chan Chye Neo* is as much applicable to the provisions of the 1950 Ordinance as it was to the Minor Offences Ordinance. It follows, therefore, that an application by a wife for maintenance for herself or her children or an application by a husband to vary the amount ordered to be paid by way of maintenance are civil matters, notwithstanding the fact that they may be dealt with summarily in a Police Court.
>
> If after an order has been made and the person against whom it is made fails to comply with the order, then no doubt the matter becomes a criminal cause or matter.

This matter has been lucidly discussed in the Court of Appeal case of *Wong Eng Fook v. Ho Kiat Moi* [1948-49] MLJ Supp. 177 the relevant parts of which is reproduced hereunder:

> In the case of *Chew Cheng Swee v. Chan Chye Neo* the members of the Appellate Court of the Straits Settlements were of the opinion that maintenance proceedings in which an order can be made for the payment of an allowance were a civil matter, and if an order for payment is made, a civil debt is created. Similarly an application to vary the amount of an allowance already ordered to be paid was held to be a civil matter since the only order which can be made on such an application is that the order is varied or affirmed. When, however, the application is one to enforce payment of arrears due under an order for maintenance the Court was of the opinion that the application was a criminal cause or matter in view of the fact that the Court may either levy or sentence the defaulter to a term of imprisonment. This decision was based upon the English case of *Seaman v. Burley* [1896] 2 QB 344 in which it was held that a judgment on a special case was stated by the justices on an application to enforce payment of a poor rate by warrant of distress was a judgment in a criminal cause or matter within s. 47 of the Judicature Act 1873 inasmuch as the proceedings before the justices might have ended in imprisonment of the person in default.

In the case of *Woosey v. Woosey* [1938] MLJ 100 McElwaine CJ was of the opinion that proceedings under sub-section 4 of s. 37 of the Straits Settlements Minor Offences Ordinance were criminal and this sub-section is almost identical with the s. 362 (i) of the Criminal Procedure Code. The learned Chief Justice also referred to the case of *Rex v. Richardson* [1909] 2 KB 856 where Lord Alverstone in considering the non-payment by a husband to his wife of a weekly sum by way of alimony, ordered to be paid under the Summary Jurisdiction (Married Women) Act 1899, stated:

> ... the order committing the man to prison for non payment is in the nature of a criminal conviction, the disobedience of the earlier order being treated as contempt which may be purged by payment.

The decision in the case of *Seaman v. Burley* was approved by the House of Lords in the case of *Amand v. Home Secretary and Minister of Defence of Royal Netherlands Government* [1943] AC 147 where Their Lordships held that the test as to whether a proceeding was a criminal cause or matter depended upon the nature and character of the proceeding and if the matter was one the direct outcome of which might be the trial of the person charged and his possible punishment for an alleged offence the matter was criminal. This latter case was applied in the case of *Rex v. Justices of the Appeals Committee of the Court of London Quarter Sessions* [1946] 1 All ER 129.

Accordingly, I held that the order of the Magistrate dated 7 January ordering the appellant to pay RM80 or in default undergo six weeks' imprisonment was an order pronounced by him in a criminal cause or matter.

On these authorities I hold that the application to enforce an order made under the Maintenance Ordinance is criminal in nature.

The next question is "Could the application for committal here be construed as having been made under O. 52 of the Rules of the High Court 1980 or the Debtors Ordinance 1957?" O. 52, 1 (2) of Rules of the High Court 1980 reads:

(2) Where contempt of Court-

(a) is committed in connection with-

(i) any proceedings before the High Court; or

(ii) criminal proceedings, except where the contempt is committed in the face of the Court or consists of disobedience to an order of the Court or a breach of an undertaking to the Court; or

(iii) proceedings in a Subordinate Court; or ...

It is clear from the above exception that the Order is not intended to apply to criminal proceedings arising from disobedience to a previous order made by the Court.

In any event I find it hard to believe that the respondent's solicitor could have mistaken this application for the notice of contempt proceedings under O. 52 since prescribed Form 110 under which that Order is worded is conspiciously different from that of our present notice.

Finally I have considered the likelihood of Counsel mistaking this application for a committal proceedings under s. 4 (7) of the Debtors Ordinance 1957. Sections 4(6) and (7) read:

(6) Upon such examination or non-appearance as aforesaid the Court may order the judgment debtor to pay the judgment debt either-

(a) in one sum whether forthwith or within such period as the Court may fix; or

(b) by such instalments payable at such times as the Court may fix.

(7) If the judgment debtor makes default in payment according to any such order, a notice in the form prescribed by rules of Court may be issued, on the request of the judgment creditor, calling upon the judgment debtor to attend before the Court at a time therein stated and show cause why he should not be committed to prison for such default.

The term 'any such order' in sub-section (7) refers to the Order made under s. 6 (a) and (b). In the applicant's notice the Order against which respondent is alleged to have defaulted is vividly particularized as the Order of Maintenance made by this Court on 12 November 1983. The same solicitor acted for the respondent during the consent order and in the present proceeding and there is no reason to doubt that the Order had not been extracted and served on them. I cannot, therefore, rationalize how they could assume that this notice was issued pursuant to s. 4(7) of the Debtors Ordinance 1957. The respondent himself is by no means a simpleton. He is the Group Sales Manager of an established insurance company drawing pay in excess of a Government superscale officer.

The question of obtaining leave for Judgment Debtors Summons before the issuance of notice do not arise under an application for enforcement of a Maintenance Order made under s. 4 of the Married Women and Children (Maintenance) Ordinance 1950. Likewise, I am unable to accept that the form of notice in this application could have given rise to the presumption that it was issued under the Debtors Ordinance 1957 or O. 52 of the Rules of the High Court 1980. If there had been any doubt at all of the nature of the notice, it would have been dispelled immediately by reading the supporting affidavit.

There is no prescribed form for a notice under s. 4 of the Married Women and Children (Maintenance) Ordinance 1950.

The form of notice as adopted in the present application has been is use in the Courts for the last 20 years and as far as I can remember nobody had ever complained of having confused it with O. 52 of the Rules of the High Court 1980 or the Debtors Ordinance 1957.

The wordings and intention of the notice sent to the respondent in this case clearly impels him to show cause why he should not be committed to prison for failing to comply with a previous Court Order. He had several options open to him. He could have made an application for variation order, or he could have made some smaller payments to show his good faith; he could have filed an affidavit in reply giving his reasons for non-compliance or he could have even pleaded verbally when he appeared before this Court, but he chose to defy the order and elected instead to object to the notice on purely technical grounds.

These grounds failed and as far as this Court is concerned the respondent has shown no other cause for disobeying the order. The application succeeds.

Maintenance orders are not punishments handed out to fathers for their sins of separation but are made to ensure the continuing supply of the necessities of life such as food, clothing, lodging and education to their minor children. A delay in payment of maintenance can only result in agonising financial hardship and embarrassment to the children especially to those of school going ages like the respondent's children.

On the balance of urgency between that of the children's indigence and the respondent's financial constraints, if any, I don't think I am being unfair in giving him one week from this date to pay the maintenance due on the notice in full, failing which he shall be committed to 1 month's imprisonment.

Also found at [1984] 2 CLJ 300